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The present article is an extended study of the history and development of forced heirship in the law of France, tracing its evolution from early forms through codification and from formative influences to recent consequences. Since the private law of France is frequently taken as a model for discussions of modern civil law, the inquiry includes some examination of the broader principles involved. This study of forced heirship in French law is likewise pertinent to other legal systems which have adopted the institution from France.

In the common law, complete freedom of disposition had been the rule. It may be interesting to civilians to observe the reassertion of the policy of testamentary restriction in a number of common law countries.[1] Most significant of all is the new English law which came into effect July 1939.[2] By throwing further light on the civil law institution of forced heirship, the present study may also be of interest to students of the common law who are observing and participating in these reforms.

FORMATIVE PERIOD

The present French law of forced heirship is not the outgrowth of a single institution. The articles of the Civil Code on the subject represent a combination of at least four distinct institutions of the "old French law" *(ancien droit français)*. Today, the right to dispose of one's property is seriously limited if either ascendant or descendant relatives survive, the extent of the disposable portion varying with the number and quality of the survivors.

To understand this result, it is necessary to investigate the elements of the early period of French law. The law of southern France was in its formative stages thoroughly romanized. Con-

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1. Dainow, Restricted Testation in New Zealand, Australia and Canada (1938) 36 Mich. L. Rev. 1107; and, Limitations on Testamentary Freedom in England (1940) 25 Cornell L. Q. 337.

2. The Inheritance (Family Provision) Act of 1938, 1 and 2 Geo. VI, c. 45. See note 1, supra.

sequently, after the barbarian conquest in the early centuries of the present era, the legal development in the south was distinct from that in the north. Although in due course the relatively small territorial units established their independent laws, each adhered fairly closely to the general legal pattern and inspiration of its part of the country. In the south—"country of the written law" (*pays de droit écrit*)—the romanized provincials constituted such an overwhelming majority of the population as to give that region a fairly uniform legal aspect, the basic pattern of which was naturally the Roman law. In the north—"country of the customary law" (*pays de droit coutumier*)—the combinations of Germanic with Roman and Canon laws as well as with local usage had occasioned the development of numerous customs patterned mainly on Germanic tradition.[3] It is impossible to specify the time when the process of division was finally completed, but the cleavage was certainly well defined by the middle of the eleventh century,[4] and it was in the north, in the country of the customs, that the greatest diversity of laws existed.

Country of the Written Law

Opinions differ regarding the continuity of active Roman influences in the south of France between the sixth and twelfth centuries. But none disputes the preservation of earlier influences and an exceedingly active revival after the animated and widely disseminated renascence of Latin and Roman interests during the twelfth century. Prior to the barbarian invasion, the country had been governed by Roman law in the form of the Theodosian Code (438 A.D.) and the writings of the jurisconsults. The conquerors permitted this system to continue under their principle of "personality of laws." In addition, there were also drawn up more concise statements of the Roman law in effect, such as the Breviary of Alaric (*Lex Romana Visigothorum*, 506 A.D.) which preserved great authority throughout the Middle Ages.[5]

Be all this as it may, in the country of the written law there existed the institution of the *légitime* in practically the same form as it had been known to the Romans. Justinian's rules[6] fix-

3. A General Survey of Events, Sources, Persons and Movements in Continental Legal History, 1 Continental Legal History Series (1912) 204.

4. Beautemps-Beaupré, De La Portion des Biens Disponible et de la Réduction (1855) 17.

5. Beautemps-Beaupré, op. cit. supra note 4, at 16-17; Vallier, Le Fondement du Droit Successoral en Droit Français (1902) 101; General Survey, op. cit. supra note 3, at 5, 17, 19.

6. Novella XVIII (Eighteenth New Constitution, 16 Scott, The Civil Law

ing an indisposable portion continued in effect; this was one-third of the estate if the children numbered four or less, and one-half if the children numbered five or more. Ascendants were entitled to one-third of their intestate share, but brothers and sisters could not make any claim unless the testator's bounty had been directed to persons of ill-repute. The original point of departure of the Roman doctrine had been complete liberty of disposition, and while this had been curtailed in the presence of surviving close relatives a trace remained in the testator's formal exercise of the power of disinheritance[7] for certain enumerated causes.

In some respects the legal technique may have been modified but the results were the same. The *querela inofficiosi testamenti,*[8] properly so-called, may have dropped out of use, but in a case of preterition, either there was just cause for the disinherison and the will stood, or the disinherison was unjust and the will fell; and if a claimant received some benefit less than his *légitime* he was entitled to obtain the supplement.[9]

The *légitime* was received not as a share of the succession but as a part of the estate. It was therefore not necessary for the claimant to occupy the position of heir; he merely claimed his due from the beneficiaries.[10] In keeping with Roman principles, the estate was regarded as one single unit of property. The fundamental idea was the duty of maintenance.

(1932) 95 et seq.); 12 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil (1827) 245.

7. Vallier, op. cit. supra note 5, at 126; Beautemps-Beaupré, op. cit. supra note 4, at 19.

8. The *querela inofficiosi testamenti* constituted a direct limitation on a testator's freedom and assured a provision for the children and other members of the immediate family despite proper but unjust disinherison in the will. Without changing the formal *jus civile,* the introduction of this praetorian equity was based on the principle that a man had a moral duty towards his children and certain close relatives, and if he disinherited them without cause it was contrary to natural duty and sentiment of affection *(officium pietatis).*

The complainant's portion under the *querela* was fixed at one-quarter of what he would have received on intestacy. In the case of several claimants each one's share was very small, and this aspect was therefore improved in Justinian's reform (supra note 6). This share was called the *pars legitima,* and the rules governing it constituted a material basis in the development of the *légitime* of the mediaeval laws and customs, and the forced heirship of the modern codes. Girard, Manuel Elémentaire de Droit Romain (8 ed. 1929) 913 et seq., 976; Buckland, A Text-Book of Roman Law (1921) 324 et seq., 338.

9. Vallier, op. cit. supra note 5, at 124, n. 3; Beautemps-Beaupré, op. cit. supra note 4, at 22-23.

10. This was further confirmed by the Ordinances of 1731 and 1735. Beautemps-Beaupré, op. cit. supra note 4, at 22; Brissaud, A History of French Private Law, 3 Continental Legal History Series (1912) 744.

The "written law" of Roman origin did not contain any basic concept of family ownership. Nonetheless, the idea of keeping property in the family was present in the minds of the people and found expression in the general testamentary practice of leaving as much of the estate as possible to the eldest son (with the charge of seeing to the maintenance and education of the other children).[11]

Country of the Customary Law

It was in the northern part of France that the more important centers of legal as well as of general development were established, and the influence of the customary law predominated in the subsequent merging of the two systems in the Civil Code. But among the different customs, numbering as many as three hundred and sixty,[12] there was considerable variation of detail due to the local influences of environmental conditions. Nevertheless, in the present field of inquiry, two significant aspects of the common basic pattern stand out distinctly: (1) the original Germanic concept of collective (family) ownership, which found expression in numerous forms of keeping ancestral property in the family,[13] and (2) the carefully observed distinctions as to the nature and source of property, with logically constructed rules for the respective combinations.[14]

Of the customary institutions which comprise the historical sources of the present limitations upon a parent's power of gratuitous disposition, the most obvious and the most important was the *réserve.* This may be defined as the part of a person's property which the law assured to his heirs, and of which these *héritiers réservataires* could not be deprived through donations made to others.[15] The amount was usually four-fifths of the ancestral property *(propres)* which had been obtained from within

11. Vallier, op. cit. supra note 5, at 103, 129, 137. Cf. 3 Planiol, Traité Elémentaire de Droit Civil (11 ed. 1937) 863, nº 3055.

12. Terrat, La Propriété, Le Code Civil Livre du Centenaire (1904) 329 (360 customs); 1 Planiol, Traité Elémentaire de Droit Civil (12 ed. 1939) 15, nº 39 (60 "general customs" and about 300 "local customs"). See Dawson, The Codification of the French Customs (1940) 38 Mich. L. Rev. 765.

13. Huebner, A History of Germanic Private Law, 4 Continental Legal History Series (1918) 304-312, 395 et seq.; Vallier, op. cit. supra note 5, at 12, 29, 80; 11 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1919) 6, § 678; 6 Beudant, Cours de Droit Civil Français (1934) 168, nº 121.

14. Colin, Le Droit de Succession, Le Code Civil Livre du Centenaire (1904) 307.

15. 3 Planiol, op. cit. supra note 11, at 860, nº 3047, 863, nº 3055.

the family. And if there were no children or descendants, the basic idea of keeping such property in the family was carried to the logical conclusion of making the claim available only to those heirs in the line whence the particular property had come.[16]

As distinguished from ancestral property, there was the acquired property *(acquêts)* obtained by a person through his own efforts or from some source outside of the family.[17] And in addition to these two kinds of property, both of which referred only to immovables, there was also the movable property; but the transcendant importance of immovable property obscured the interest in movables and very little legal attention was devoted to the latter. Thus, as distinguished from the indisposable part, there was the disposable portion *(quotité disponible)* over which a person had absolute freedom. This part consisted of the remaining one-fifth of the ancestral property, all of the acquired property, and all of the movables.[18]

Although the *réserve* constituted a forced intestate succession of a part of the estate, so as to insure its remaining in the family,[19] there was not always a substantial amount of (or any) ancestral property. To meet this kind of situation, a modification was introduced that in default of ancestral property there should be substituted in its stead either the acquired property or, in default of both, the movable property. Neither of the latter kinds of property took on the character of the former by this so-called "subrogation"; there was merely impressed on it the restriction of indisposability.[20] While this was only a palliative it was really a significant departure from the basic idea of family interest and bears a much greater resemblance to the Roman principle of maintenance. However, since it functioned poorly and was not extensively applied it was regarded with keen disapproval.

On the other hand, it was relatively simple for the Roman *légitime* from the country of the written law to diffuse more gen-

16. Vallier, op. cit. supra note 5, at 82; 11 Aubry et Rau, op. cit. supra note 13, at 6, § 678; Beautemps-Beaupré, op. cit. supra note 4, at 59; 8 Pothier, Oeuvres (ed. Bugnet, 1861) 275, nº 188 (Traité des Donations Testamentaires, c. IV, art. II, § IV).

17. Brissaud, op. cit. supra note 10, at 273.

18. 8 Pothier, op. cit. supra note 16, at 272, nºs 178 et seq. (Traité des Donations Testamentaires, c. IV, art. II).

19. This retention of property in the family answered so well to the spirit of the landed aristocracy that the *réserve* has even been regarded as an institution of feudal law. See 6 Beudant, op. cit. supra note 13, at 172, nº 124.

20. Vallier, op. cit. supra note 5, at 85, 86, n. 1.

erally into and become adapted to the customs of the north. It took some time for this so-called *légitime de droit* to be introduced into the customary law, but attempts to foster the idea of a moral duty to provide for the maintenance of children began as early as the thirteenth century.[21] The policy spread very widely, and most customs established this claim for sustenance in favor of children only; some customs extended it to ascendants. In the early stages it was not fixed at any particular amount but for reasons of expediency it usually became established as one-half of the intestate share.[22] Following the Roman tradition it was a personal claim and not a share in the succession. To coordinate with other institutions of the customary law, this *légitime de droit* could only be claimed either when the *réserve* was an empty right, or as a cumulation when the latter was inadequate. In order to be effective it retained the Roman character of affecting all property regardless of nature or source.[23]

In some customs there also developed the *légitime coutumière*. This combined the application of the *réserve* to ancestral property (to the extent of one-half of all such property) with the effectiveness of the *légitime de droit* against donations inter vivos as well as those mortis causa, and extended the right to all lineal heirs (like the *réserve*).[24]

The *légitime coutumière* was not widely adopted, and was displaced completely when the *légitime de droit* took on the character (from the *réserve*) of requiring the quality of heir in a claimant. This final combination is usually the only one referred to as the *légitime* of the customary law and it functioned as a supplement to the *réserve*.

In view of the Germanic customary origin of the *réserve*, of restraints upon alienation and other manifestations of collective ownership, the development of individual rights of disposition

21. Engelman, Testaments Coutumiers (1903) 258-9; Brissaud, op. cit. supra note 10, at 741.

22. Vallier, op. cit. supra note 5, at 87-88; Beautemps-Beaupré, op. cit. supra note 4, at 53; 8 Pothier, op. cit. supra note 16, at 420, nº 212 (Traité des Donations entre vifs, sec. III, art. V).

23. 11 Aubry et Rau, op. cit. supra note 13, at 6-9, § 678; Beautemps-Beaupré, op. cit. supra note 4, at 60.

24. 1 Pothier, op. cit. supra note 16, at 418 (Introduction to Title XVI, Custom of Orleans, "des Testaments, et Donations Testamentaires," sec. IV, § 2, nº 53); 8 id. at 275-276, nºs 188, 189 (Traité des Donations Testamentaires, c. IV, art. II, § IV); 8 id. at 431, nº 245 (Traité des Donations entre vifs, sec. III, art. VI); Beautemps-Beaupré, op. cit. supra note 4, at 65; 11 Aubry et Rau, op. cit. supra note 13, at 9, § 678.

could only have been by way of encroaching exception or partial victory of the individual interest over that of the family.[25] A comparison of the customary *réserve* and the Roman *légitime* may show a great prima facie resemblance, but though their results were in some aspects the same their respective developments started at opposite extremes and approached a common ground by evolving in a converging direction. Nothwithstanding the differences between the laws of the north and of the south, the social and economic needs were very much the same all over the country and variations in legal technicalities could not prevent the same results.[26]

In the formative elements of the customary law, one very significant aspect of the general pattern seems to be a decrease in the original emphasis on the interest of the family in order to make a more important place for the interest of the individual. During the revolutionary period, the interests of the state take first rank; and in the codification, all three interests combine in a sort of compromise.

Revolutionary Period and Preparation of the Civil Code

The general principles of the French Revolution found expression in every phase of the life of the people and of the development of their institutions. But while political liberty and individual equality were among the major objectives of the revolution against the old régime, the all-devouring interest of the state took exclusive precedence wherever possible.

The legal scheme of successions was regarded as one of the most important branches of private law. And the right of ownership, being the creation of society, was to be exercised only within the limits of the interests of the state (which represents society).[27] Thus, while equality of inheritance was established by the abolition of all feudal privileges and other preferences, it was in the interest of the state that the individual's liberty of disposition (inter vivos or mortis causa) was curtailed more than ever before. Testation had to be regulated in the general social interest. Forced parcellation of property would break up and prevent the concentration of large landed estates; it would also encourage an increase in population and favor the coming generation with this protection against parents of the older tradition.

25. Cf. Vallier, op. cit. supra note 5, at 72-79.
26. Id. at 136-137. Cf. 6 Beudant, op. cit. supra note 13, at 170, nº 122.
27. Vallier, op. cit. supra note 5, at 192-193.

Such a maximum distribution of property would be a necessary measure for the development of the public wealth (the state).[28]

Legislation

In this spirit there were passed a number of laws dealing with the general subject of the present inquiry. One of the first decrees[29] abolished the feudal régime;[30] two others[31] abrogated all the privileges and preferences of inheritance. An early law[32] did away with substitutions. The old distinctions as to the nature and origin of property were likewise eliminated, leaving the estate as one single unit.[33] And when it was discovered that all these efforts to establish equality could be upset by gifts and legacies, a law[34] was passed removing all power of disposition in the direct line.[35] These laws were obviously the expressions of nervous reaction still at the heat of excitement, but there were also two more carefully considered legislative measures.

The law of 17 nivose, year II (January 6, 1794)[36] came about as a result of the discussion on successions in Cambacérès' first unsuccessful project for a complete civil code. This law was not quite so radical; it provided that a person could dispose of one-tenth of his estate if he left heirs in the direct line, and of one-sixth if there were only collaterals. This disposable portion could be given only to strangers, so as not to disturb the equality between the heirs.

After six years of further unhappy results,[37] a more reasonable compromise was made between the interests of the property-owner and the other members of his family. The law of 4 ger-

28. Id. at 195, 201, 204, 206-7; Brissaud, op. cit. supra note 10, at 746; 3 Colin et Capitant, Cours Elémentaire de Droit Civil Français (8 ed. 1936) 755, nº 928; 3 Planiol, op. cit. supra note 11, at 864, nº 3056; Terrat, supra note 12, at 330.

29. Decree, August 4, 1789; Beautemps-Beaupré, op. cit. supra note 4, at 67.

30. If the *réserve* is considered as part of the feudal system (see supra note 19) it was hereby abolished. 6 Beudant, op. cit. supra note 13, at 174, nº 126.

31. Decrees, March 15, 1790, April 8, 1791; Beautemps-Beaupré, op. cit. supra note 4, at 67.

32. Law, August 25, 1792; Beautemps-Beaupré, op. cit. supra note 4, at 69.

33. Colin, supra note 14, at 301.

34. Law, March 7, 1793; Beautemps-Beaupré, op. cit. supra note 4, at 69-70; 3 Colin et Capitant, op. cit. supra note 28, at 756, nº 928.

35. Allegedly introduced by a member of the Assembly who found himself thus excluded. Beautemps-Beaupré, op. cit. supra note 4, at 69.

36. Beautemps-Beaupré, op. cit. supra note 4, at 72; 3 Colin et Capitant, op. cit. supra note 28, at 756, nº 928.

37. 3 Planiol, op. cit. supra note 11, at 864, nº 3056.

minal, year VIII (March 25, 1800)[38] graded the disposable portion so that it was one-fourth if three or fewer children survived, one-fifth if four children, one-sixth if five children, and so on.

Both of these laws merely fixed the limits of the disposable portion, so that the remainder constituted a forced intestate succession. Consequently, it was necessary for the claimant to have and to exercise the quality of heir.[39]

In accordance with the general principles of the revolutionary spirit, all the enactments provided an extremely large compulsory portion for children. But these reactions started with excessive extremes[40] and had to be tempered down consistently to a more suitable equilibrium.[41]

Unsuccessful Attempts at Codification

The French Civil Code has justly been hailed as one of the most outstanding legal achievements of recent centuries, but the idea of a unified and uniform body of law for the whole of France was very old. Some of the inspirations—dating back to the time of Louis XI—advanced no further than the thought, and the strong local traditions of a surviving legal independence prevented any complete realization of such a project; nevertheless, the partial progress made by a number of attempts paved the way for ultimate codification.[42]

Plans for a general code were included in the proposed work of all the national political assemblies after the revolution, and a number of complete projects were actually presented.[43] The first

38. Beautemps-Beaupré, op. cit. supra note 4, at 81; 3 Colin et Capitant, op. cit. supra note 28, at 757, nº 928.

39. Beautemps-Beaupré, op. cit. supra note 4, at 82-83.

40. Cf. Vallier, op. cit. supra note 5, at 185.

41. Cf. Garrigou, De l'Influence du Régime Successoral Français sur l'Etat de la Propriété Foncière (1911) 38; Colin, supra note 14, at 298.

42. Louis XI's idea (in about 1480) of unifying all the customs; Dumoulin's recommendation of a uniform code (c. 1560); States General's votes (1560, 1576, 1614) to compile one; Brisson's work (1603); Colbert's Great Ordinances (1667-1681) under Louis XIV; Lamoignon's incomplete and unofficial work (1672); D'Aguesseau's Ordinances (1731-1747). 1 Planiol, op. cit. supra note 12, at 22 et seq., nºs 54 et seq., translated in General Survey, op. cit. supra note 3, at 279.

43. The Constituent Assembly voted (October 5, 1790) that a general code be made; the Constitution of 1791 contained the promise; only inchoate steps were taken by the Legislative Assembly (1791); four complete projects were presented to the Convention, the Directory and the Consulate (1793-1799). 1 Planiol, op. cit. supra note 12, at 25 et seq., nºs 64 et seq., translated in General Survey, op. cit. supra note 3, at 280.

of these projects for a civil code[44] was drawn up by a legislative committee of the Convention and presented by Cambacérès on August 9, 1793. An excessively brief work of 695 articles, it was really inadequate; and although of a very revolutionary spirit it did not satisfy the assembly. However, its proposed regulations for the limitation of testamentary disposition were enacted in the law of 17 nivose (supra).

In a second project[45] of only 297 articles presented by Cambacérès on 23 fructidor, year II (September 9, 1794) the same rules for the transmission of property were repeated, because they were considered a just balance between the interests involved—right of ownership, bonds of blood, political laws, division of property, public prosperity. This project was sent back to the committee for revision and thus led to the next one.

The third project[46] came under the Directory, and was presented by Cambacérès to the Council of Five Hundred in the month of messidor, year IV (1795). The disposable portion to the prejudice of direct heirs was retained as one-tenth of the estate (as in preceding projects); but to the prejudice of collaterals it was increased, on the theory that where the family relationship was weaker the liberty of disposition should increase, so that a person could dispose inter vivos of one-half of his estate, and mortis causa of one-third. However, partisan dissension in the assemblies prevented any progress of the project, and like its predecessors it fell by the wayside.

Just as the Consulate was coming into existence, a fourth project[47] was presented to the Council of Five Hundred by Jacqueminot on 30 frimaire, year VIII (December 21, 1799). The disposable portion was now further increased so that a person could dispose of one-fourth of his estate if he left any descendants, one-third if ascendants, brothers or sisters, and one-half if uncles or cousins. But this project came at a bad time and made no headway at all.

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44. 1 Fenet, op. cit. supra note 6, at 1, 8, 51 (arts. 24, 26); Beautemps-Beaupré, op. cit. supra note 4, at 86; 1 Planiol, op. cit. supra note 12, at 27, nº 70, translated in General Survey, op. cit. supra note 3, at 280.

45. 1 Fenet, op. cit. supra note 6, at 99, 106-107, 119 (art. 96); Beautemps-Beaupré, op. cit. supra note 4, at 87; 1 Planiol, op. cit. supra note 12, at 28, nº 71, translated in General Survey, op. cit. supra note 3, at 280.

46. 1 Fenet, op. cit. supra note 6, at 140, 166, 259 (arts. 542, 543); Beautemps-Beaupré, op. cit. supra note 4, at 87; 1 Planiol, op. cit. supra note 12, at 28, nº 74, translated in General Survey, op. cit. supra note 3, at 280.

47. 1 Fenet, op. cit. supra note 6, at 327, 370 (art. 16); Beautemps-Beaupré, op. cit. supra note 4, at 88.

Napoleon's Undertaking

Despite these set-backs, the desire and the need for a general code of private law were becoming more and more urgent. The obstacles to its accomplishment were hitherto impassable; it required the energy and the strategy of a strong personality[48] to bring about the long-awaited Civil Code.[49]

The law (or title) which included the subject under survey was captioned "Of Gifts inter vivos and of Wills," and it is striking that in all the discussion not a single opinion was expressed against the limitation of a parent's power of disposition. There was some difference of opinion as to its extent, and there was overwhelming opposition against limitation in favor of collaterals. But the assurance of provision for children was axiomatic.

In the preliminary speech introducing the whole project before the Council of State, Portalis explained the basic principles that a man's rights of ownership came to an end with his death, and that the intervention of the state in matters of inheritance

48. Napoleon's part in the framing and in the final realization of the Civil Code has been a disputed subject. His role was certainly not a nominal one like that of Justinian; he presided over and took part in about one hundred sessions of the Council of State. His minor *coup d'état* to obviate the unfriendly interference of the Tribunate must in itself rank him as a very active participant. See 1 Planiol, op. cit. supra note 12, at 35, nº 91, 30, nº 80, translated in General Survey, op. cit. supra note 3, at 281; Lobingier, Napoleon and his Code (1918) 32 Harv. L. Rev. 114, 123-126.

49. In appointing a commission to draft a new project, Napoleon chose two men from the country of the customs and two from the country of the written law, taking one member from the bench and one from the bar in each case. These persons were all past middle age, but Napoleon wanted jurists well versed in the old law to construct a basic framework which could be remodelled in the course of legislative process so as to fit existing conditions. Tronchet was president of the Court of Cassation; Bigot-Préameneu was government commissioner at the Court of Cassation; Portalis was government commissioner at the Prize Court; Malleville was a judge of the Court of Cassation. 1 Planiol, op. cit. supra note 12, at 28, nº 75, translated in General Survey, op. cit. supra note 3, at 281; Lobingier, supra note 48, at 117-118, 122-123.

The commission came into being on 24 thermidor, year VIII (August 13, 1800), and in accordance with instructions a project was reported in four months. Three months were then allowed for the comment and criticism of the judiciary of the country. For the *"observations"* of the Court of Cassation and of all the Courts of Appeal, see Fenet, op. cit. supra note 6, vols. 2, 3, 4, 5.

The legislative machinery through which any measure had to be piloted was extremely complicated. General Survey, op. cit. supra note 3, at 281-282; 1 Fenet, op. cit. supra note 6, lxiv et seq.; Tucker, Legislative Procedure in the Adoption of the Code Napoleon (1935) 1 Rep. State Bar of Louisiana 26. The whole project was divided into a number of separate laws or titles, and each of these was dealt with as an independent unit. But one of the legislative bodies contained so many elements strongly opposed to Napoleon that as soon as they manifested this hostile attitude towards the first two parts of the project, Napoleon withdrew the whole matter from further consideration and reorganized that body (Tribunate) so that, together with a new mode of procedure, the danger of obstruction was eliminated.

and testation was indispensable because the interests involved were much broader than those of the individuals concerned. A limited leeway for disposition should be established to retain some sanction of parental authority and to make possible worthy benefactions. In conclusion he clearly emphasized that the ultimate objective of all civil institutions—even a good family spirit encourages good citizenship—was the interest of the state.[50]

Following these principles, the Project of the Year VIII[51] proposed that donations, inter vivos or mortis causa, should not exceed one-fourth of a man's estate if he left surviving children or descendants, one-half if ascendants, brothers or sisters, and three-fourths if only nephews or nieces. In the absence of all these classes, there should be no limitation.

After passing through the committee on legislation of the Council of State, the proposed title was formally reported to this assembly by Bigot-Préameneu.[52] Such a law, he stated, was not really in contravention of a parent's wish but rather in conformity with his presumed affections. After giving children their natural existence it was not only the duty as a parent but also as a citizen, to the children and to society, not to abuse any powers of ownership and to assure the children a proper civil existence. Unfortunately, long experience had shown the weaknesses of human nature, and to eliminate such possibilities it was indispensable to the social order that formal limitations, effective against dispositions inter vivos and by will, should express the most desirable balance between a person's right of ownership and his parental duty.

The article proposed[53] now presented a completely new aspect: instead of placing limits on the power of disposition, it created a positive *légitime* in favor of certain persons, consisting of a fraction of what would have been their share on intestacy. This fraction was three-fourths for descendants, one-half for ascendants, and one-fourth for brothers and sisters—the second and third groups taking only in default of the preceding ones. Why this change was made, does not appear; but before the proposed form had been in discussion long it was changed back

50. 1 Fenet, op. cit. supra note 6, at 463, 518, 520, 521, 522.
51. Projet de Code Civil (Projet de l'An VIII) (1801) book III, tit. IX, art. 16; 2 Fenet, op. cit. supra note 6, at 3, 276.
52. Session of 30 nivose, year XI (January 20, 1803); 12 Fenet, op. cit. supra note 6, at 244 et seq.
53. Id. at 254.

to the previous form, with the added innovation of graduating the disposable portion according to the number of surviving children.

The discussion in the Council of State[54] was varied. One view[55] maintained that the disposable portion should be very small because testation was merely a benefit bestowed by the civil and not the natural law. This was balanced by another opinion[56] that the latitude should be greater because penalty and recompense are great stimuli of human activity and that testation could serve further uses for society in leveling off inequalities from other causes. The chairman proposed[57] that the parent's limitation should be graduated between one-half and three-fourths in accordance with the number of surviving children. This was acceptable to all and the amendment was adopted[58] by the Council of State. When the article was redrafted, along the original lines of limiting the parent's disposition,[59] it appeared in the form which carried right through into the official Code: if a parent left one child he could dispose of one-half of his estate, if two children one-third, and if three or more children one-fourth.

The next step was the unofficial communication[60] to the legislative section of the Tribunate. The result of this conference[61] between the committees of the two assemblies were reported back to the Council of State,[62] and while the observations of the members of the Tribunate regarding the drafting were not followed, their adamant opposition against limitations for the benefit of collaterals was heeded and this was completely removed in the definitive redaction of the title.[63] The Council of State accepted the criticism of the Tribunate that the interest of a collateral was not sufficient cause to justify interference with

54. Id. at 254 et seq., 299 et seq.
55. Id. at 257, 300 (Tronchet).
56. Id. at 254, 307 (Malleville); id. at 258, 311 (Portalis further added that there were more ungrateful children than unjust parents). These were the two representatives from the country of the written law.
57. Id. at 260, 300 (Second Consul Cambacérès).
58. Id. at 319.
59. Art. 21: *"Les libéralités, soit par actes entre-vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant; le tiers, s'il laisse deux enfants; le quart, s'il en laisse un plus grand nombre."* Id. at 419.
60. Id. at 439.
61. Id. at 440 et seq.
62. Id. at 469 et seq.
63. Id. at 473 et seq.

the right of disposition, and that the absence of limitation would even bring collaterals into a closer dependence upon each other.[64]

Representatives from these two assemblies still had to take the measure before a third assembly which actually did the voting. In the name of the Council of State, Bigot-Préameneu presented the *exposé des motifs* to the Legislative Body.[65] In explaining this part of the title, he emphasized the importance of the rules regarding disposition as an influence on the customs of the people and on the happiness of the family. Between the extreme power of disposition and its complete elimination in favor of the family, a middle path had been chosen so as to give parents as much leeway as was compatible with the children's retention of their status.

Since the differences between the Council of State and the Tribunate had been straightened out long in advance, the official communication to the Tribunate[66] was a matter of form only. The speeches[67] on this part of the title expressed complete accord with the compromise that had been reached as the conciliation between the rights of parents, the interests of children, and the general welfare of the state.

The last step was the official reply by the Tribunate in the speech of its representative before the Legislative Body[68] for whom there was simply left the vote[69] of adoption.[70]

Post-Codification Period

The basic limitations of gratuitous disposition are embodied in the Civil Code[71] as follows:

64. Id. at 444-445, 470.
65. Id. at 508 et seq.
66. Id. at 575.
67. Id. at 575 et seq. (Jaubert); id. at 623 et seq. (Sedillez).
68. Id. at 627 (Favard).
69. Session of 23 floréal, year XI (May 13, 1803). Id. at 647.
70. In this manner, each of the separate laws (or titles) was manoeuvred through the legislative process until all of them had been passed. Then the combined laws (36) forming the entire Code received final passage as a single unit which was promulgated on 30 ventose, year XII (March 21, 1804) as the "Civil Code of the French." After four successive changes of name, to and from the name of "Code Napoléon," the Code has since 1870 been referred to simply as the "Civil Code." March 21, 1804—*Code civil des Français;* September 9, 1807—*Code Napoléon;* Charters 1814, 1830—*Code civil des Français;* March 27, 1852—*Code Napoléon;* since 1870—*Code civil* (leaving the name *Code Napoléon* to designate the original form). 1 Planiol, op. cit. supra note 12, at 32, nº 85, translated in General Survey, op. cit. supra note 3, at 285; 1 Fenet, op. cit. supra note 6, at lxxx et seq., cxviii et seq.
71. Art. 913, French Civil Code: *"Les libéralités, soit par actes entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il*

Art. 913. "Gratuitous dispositions, whether by deed inter vivos or by will, may not exceed one-half of the property of the donor, if he leaves at his death only one legitimate child; one-third, if he leaves two children; one-fourth, if he leaves three or a greater number. . . ."

Art. 914. "Gratuitous dispositions whether by deed inter vivos or by will may not exceed one-half of the property, if, in default of children, the decedent leaves one or more ascendants in each of the paternal and maternal lines, and three-fourths if he leaves ascendants in one line only. . . ."

In the interpretation and application of these and related provisions of the Code, there were no serious differences of opinion among the jurists and commentators because the general ideas had been clearly expressed in the legislative debates. The questions[72] that did arise were concerned with (a) the exact historical origin of the institution which the Code had consecrated, and (b) problems in the actual application of the principle to individual cases.

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ne laisse à son décès qu'un enfant légitime; le tiers, s'il laisse deux enfants; le quart, s'il en laisse trois ou un plus grand nombre.

"L'enfant naturel légalement reconnu a droit à une réserve. Cette réserve est une quotité de celle qu'il aurait eue s'il eût été légitime, calculée en observant la proportion qui existe entre la portion attribuée à l'enfant naturel au cas de succession ab intestat *et celle qu'il aurait eue dans le même cas s'il eût été légitime.*

"Sont compris dans le présent article, sous le nom d'enfants, les descendants en quelque degré que ce soit. Néanmoins, ils ne sont comptés que pour l'enfant qu'ils représentent dans la succession du disposant."

Art. 914, French Civil Code: *"Les libéralités, par actes entre vifs ou par testament, ne pourront excéder la moitié des biens, si, à défaut d'enfant, le défunt laisse un ou plusieurs ascendants dans chacune des lignes paternelle et maternelle, et les trois quarts, s'il ne laisse d'ascendants que dans une ligne.*

"Les biens ainsi réservés au profit des ascendants seront par eux recueillis dans l'ordre où la loi les appelle à succéder; ils auront seuls droit à cette réserve, dans tous les cas où un partage en concurrence avec des collatéraux ne leur donnerait pas la quotité de biens à laquelle elle est fixée."

Art. 915, French Civil Code: *"Lorsque, à défaut d'enfants légitimes, le défunt laisse à la fois un ou plusieurs enfants naturels et des ascendants dans les deux lignes ou dans une seule, les libéralités par actes entre vifs et par testament ne pourront excéder la moitié des biens du disposant s'il n'y a qu'un enfant naturel, le tiers s'il y en a deux, le quart s'il y en a trois ou un plus grand nombre. Les biens ainsi réservés seront recueillis par les ascendants jusqu'à concurrence d'un huitième de la succession, et le surplus par les enfants naturels."*

The present discussion excludes consideration of illegitimate children; suffice it to say that their rights have been very substantially improved and increased by the law of March 25, 1896, which amended these articles.

72. Since the present discussion can only inquire into fundamental rules and principles, it is impossible to do more than indicate the general nature and substance of some of these issues.

(a) The system adopted by the Civil Code to restrict the power of disposition resembled certain aspects of both the *réserve* and the *légitime* of the old law. It is striking that the latter name does not appear in any of the final code articles[73] despite its frequent occurrence in the debates, and although the former is found a few times[74] the two have subsequently been used interchangeably. The textual use of the word *réserve* and the predominant influence of the customary law in the codification might be magnified into the argument that the old *réserve* was the basic source of the new one.[75] At the same time, the retention of important functions of the old *légitime* argues equally well for the other contention[76] despite the loss of the name.

The institution under the Civil Code resembles the old *réserve* in that it constitutes a share of the succession and can only be obtained in the quality of heir. It resembles the old *légitime* in that (1) it is granted only to relatives in the direct line, (2) it is effective against donations inter vivos as well as those mortis causa, and (3) it affects all property without distinction as to nature or source. And differing from both of the older institutions, forced heirship under the Code permits a different disposable portion and provides for a variation of the fraction according to the number of surviving children.[77]

The fact remains that the Code took much from both of the basic institutions of the old law, and the combination had a new identity of its own. From the legislation of the revolutionary period and from the debates in the preparation of the Code, it is manifest that the disappearance of the distinctions as to nature and source of property was linked up with a general departure from the concept of retaining property in the family. Forced parcellation of property was closely associated with the political issues of the period, and the exclusion of a compulsory provision

73. 12 Laurent, Principes de Droit Civil Français (1893) 14, nº 8.

74. Used originally in the project as a verb only, then as a noun in reference to collaterals, and when the provisions for the latter were dropped, the use of the word as a noun in other texts remained. Beautemps-Beaupré, op. cit. supra note 4, at 97.

75. E.g., Beautemps-Beaupré, op. cit. supra note 4, at 98.

76. E.g., "the *légitime* under the name of *réserve*." 12 Laurent, op. cit. supra note 73, at 14, nº 8. The Civil Code kept the name of the institution it suppressed, and suppressed the name of the institution it kept. Vallier, op. cit. supra note 5, at 297.

77. Cf. Levasseur, Portion Disponible (1805) 3 et seq.; 11 Aubry et Rau, op. cit. supra note 13, at 10 et seq., § 679; 3 Colin et Capitant, op. cit. supra note 28, at 757 et seq., nº 929; 3 Planiol, op. cit. supra note 11, at 864, nº 3057; 6 Beudant, op. cit. supra note 13, at 175 et seq., nº 127.

for collaterals was the last gasp of the family ownership concept in submission to the complete emergence of the individual right. That this right should be limited in favor of children and parents was the only possible solution for the coexistence of conflicting rights.[78] If anything, it was the old idea of *officium pietatis* supplanting the retention of property in the family.[79]

The power of disinheritance was removed under the Civil Code,[80] but a child was excluded from the *réserve* if he was "unworthy" of inheriting and thereby deprived of the quality of heir.[81] Indirect methods of defeating the compulsory portion by means of purchasing life insurance annuities, and so forth, have been frowned upon and are not common.[82]

Thus, while there never was any question about limiting the power of disposition, and while the early institutions of the formative period were distinctly manifest in the modern *réserve* under the Code, there was no exclusive relation to any one of them. The result was the combination of desirable functions from all of them adapted to the new political and economic conditions.

(b) The problems which arose in the application of the principle are exemplified in the following illustration: when a man dies leaving three children, and two of them renounce, is the one who accepts entitled to one-half or three-fourths of the estate? If those renouncing are excluded from the count, he would be

78. The eternal mission of positive law. 6 Beudant, op. cit. supra note 13, at 187. See also Vallier, op. cit. supra note 5, at 297; 5 Toullier, Le Droit Civil Français (5 ed. 1830) 107.

79. There is a duty to close relatives, and no longer a sort of family deposit. 6 Beudant, op. cit. supra note 13, at 180, nº 127; 3 Colin et Capitant, op. cit. supra note 28, at 758, nº 929; Brissaud, op. cit. supra note 10, at 748. This must be distinguished from the alimentary obligation during lifetime, because the *réserve* is obtained by the rich as well as the poor—the duty is thus based on relationship rather than purely on need. Vallier, op. cit. supra note 5, at 299. But see 3 Josserand, Cours de Droit Civil Positif Français (1930) 856, that the *réserve* is the transformed continuation of the alimentary obligation. 2 Demolombe, Traité des Donations Entre Vife et des Testaments (4 ed. 1872) 5, adds a reason for the *réserve* in the interest of the state to avoid the burden of such needy persons.

80. Compare the rationalization that in the presence of the strong bond of relationship such an expression of mind must have been incomplete, and the law retains what is good and reasonable by disengaging the proper manifestation of will from the harmful passions. It is not the declared intention but the presumed intention which must govern. Beautemps-Beaupré, op. cit. supra note 4, at 99-100.

81. The causes of unworthiness are enumerated in Art. 727, French Civil Code. See 3 Planiol, op. cit. supra note 11, at 391, nº 1731; 3 Colin et Capitant, op. cit. supra note 28, at 758, nº 929; Vallier, op. cit. supra note 5, at 304.

82. 3 Planiol, op. cit. supra note 11, at 862, nº 3052; Amos and Walton, Introduction to French Law (1935) 339.

entitled to one-half, as an only child; if they are to be counted in determining the indisposable portion which is to be divided amongst those who accept, he would get three-fourths.

The latter procedure seems unreasonable but it is the one which has been generally accepted because the language of the Code fixes one-fourth as the limit of the disposable portion "if he leaves at his death . . . three or a greater number."[83] The preliminary issue of requiring the quality of heir having been resolved in the affirmative, and the indisposable portion constituting a forced intestacy,[84] the conclusion follows that one accepting child receives the whole *réserve* (three-fourths of the estate) for the calculation of which the two others had also been counted.

The reduction[85] of excessive donations cannot be determined until the opening of the succession and the formation of a fictitious estate including the assets gratuitously disposed of during lifetime. After the deduction of debts and the calculation of the disposable portion, the excessive legacies are simply cut down proportionately or eliminated altogether. But as to gifts inter vivos the matter is much more complicated. Such gifts are not affected until all the legacies have been exhausted, and then only in the order of the more recent before the more remote. Since the theory of reduction is the resolution of the donee's right, the latter will be deemed never to have owned that part,[86] and consequently all rights conveyed by him must suffer the same precarious status.

Although in principle the forced heir can demand reduction in kind without distinction as to movables or immovables,[87] his recourse to recover a movable object from a subsequent acquirer

83. Levasseur, op. cit. supra note 77, at 25; Beautemps-Beaupré, op. cit. supra note 4, at 115-116; 3 Planiol, op. cit. supra note 11, at 866, nº 3061; Troplong, Droit Civil Expliqué, Des Donations entre-vifs et des Testaments, Vol. II (1872) 171 et seq., nº 784; 5 Toullier, op. cit. supra note 78, at 115.

84. Since the Code fixes the limits of the portion which is disposable, the balance is indisposable and necessarily constitutes a forced intestacy. Levasseur, op. cit. supra note 77, at 28; Beautemps-Beaupré, op. cit. supra note 4, at 101 et seq.; 12 Laurent, op. cit. supra note 73, at 18, nº 10, 22 et seq., nº 13; 3 Planiol, op. cit. supra note 11, at 874, nº 3078; 6 Beudant, op. cit. supra note 13, at 176, nº 127; Vallier, op. cit. supra note 5, at 303-304.

85. Arts. 920-930, French Civil Code.

86. 5 Planiol et Ripert, Traité Pratique de Droit Civil Français (1933) 108, nº 113, 110, nº 115; 3 Colin et Capitant, op. cit. supra note 28, at 801, nº 973; 6 Beudant, op. cit. supra note 13, at 256, nº 189. However, the donee is permitted to retain the fruits derived up to the time of the donor's death. Art. 928, French Civil Code.

87. 5 Planiol et Ripert, op. cit. supra note 86, at 109, nº 114; 3 Colin et Capitant, op. cit. supra note 28, at 802, nº 975.

is practically cut off by the codal provision that possession of movable property is equivalent to title.[88] To recover immovable property, recourse against third persons is specifically made available[89] as long as prescription has not run.[90] But the action for reduction is essentially against the donee,[91] and if he is solvent the heir may be obliged to accept a payment in money[92] without recourse against property which has passed to a third person.[93]

Social and Economic Consequences

Many comments and criticisms have been made regarding the effects, or alleged effects, produced by forced heirship. Mention is here made of some of these observations in relation to: property matters, the interests of the family, the question of population, and proposed reforms.

(a) *Property* (land). The first necessary and obvious result caused by the *réserve* in combination with the basic principle of equality in successions was the forced parcellation of land. This widening distribution of wealth was one of the important objectives of the revolutionary spirit. The fact of extensive parcellation is very manifest, but to its operation all sorts of consequences have been attributed.

The arguments of the opponents[94] of the system center around two main ideas: primarily, the continual splitting of property seriously decreases agricultural exploitation by precluding large scale methods while the property is still productive enough for such work; and secondly, the ultimate result of carrying this process to its logical conclusion is that the resultant little bits of land are not productive enough for any kind of work.

88. Art. 2279, French Civil Code. 6 Beudant, op. cit. supra note 13, at 256, nº 189.

89. Art. 930, French Civil Code.

90. Extinctive prescription of 30 years from the opening of the succession, or acquisitive prescription of 10 or 20 years by a possessor in good faith with just title. 5 Planiol et Ripert, op. cit. supra note 86, at 123-124, nºs 127, 128.

91. 5 Planiol et Ripert, op. cit. supra note 86, at 115, nº 119.

92. Id. at 109, nº 114, 115, nº 119; 3 Colin et Capitant, op. cit. supra note 28, at 802, nº 975.

93. The only possibility of prejudice is to the third person who has acquired immovable property from a donee who is insolvent when sued for the reduction.

94. E.g., Le Play and his School. See in Garrigou, op. cit. supra note 41, at 31 et seq., 82, 98; 5 Roguin, Traité de Droit Civil Comparé—Les Successions (1912) 661; Coulon, De La Liberté de Tester: Motifs et Projet de Loi (1899) 38 et seq.

In reply, the proponents[95] assert that (1) there is no proof of excessive parcellation nor of any harmful effects, (2) on the contrary, the cultivation of the land and the condition of the people have improved, and (3) the system of small properties predominates by reason of its own virtue. There is really no continual and irresistible pulverization of land, because natural and economic forces keep this process within the limits of productivity by either preventive or corrective methods.[96] These counteracting forces are manifest in sales, exchanges, settlements, partnerships, marriages, incorporations, credit asociations, and so forth.

(b) *Family.* It has been contended[97] that this part of the succession laws ruins all family discipline, and discourages initiative and ambition. The children know that they can not be deprived of their portion and the paternal authority is destroyed. Then, each one gets so little that his attempt to live on the land is not only futile but also harmful to his welfare. Finally, the petty quarrels of spite and jealousy between children need no elaboration.

Needless to say, these contentions are refuted by the opposite conclusions which find favorable results from the same causes.[98] While it is conceded that the family is more mobile, less stable and less rigidly constituted as a result of enforced partition, the weakened parental authority has been supplemented by more kindness and affection. Furthermore, the rule of equality has removed the great cause of jealousy so that the family as a unit has concentrated. The principle of equality is so essentially a part of the notion of justice that there can be no question about accepting the corollary of enforced partition.

(c) *Population.* Partly related to the preceding issue but sufficiently distinct to be indicated separately, are the alleged effects of these succession laws in seriously reducing the birth-

95. E.g., Garrigou, op. cit. supra note 41, at 82 et seq., 97; Bonnal, La Liberté de Tester et la Divisibilité de la Propriété (1866) 327 et seq.

96. Garrigou, op. cit. supra note 41, at 86, 94; Boissonade, Histoire de la Réserve Héréditaire (1873) 654 et seq.; Charmont, Changes of Principle in the field of Family, Inheritance, and Persons, 11 Continental Legal History Series (1918) 147, 158 et seq.; Voirin, La Famille et l'Heritage, Le Maintien et la Défense de la Famille par le Droit, Lecture No. 6 (1930) 168; Bonnal, op. cit. supra note 95, at 280.

97. By Le Play and others: see in Garrigou, op. cit. supra note 41, at 52 et seq.; and in Coulon, op. cit. supra note 94, at 28, 31, 38, 42.

98. Charmont, supra note 96, at 149, 155, 161; Voirin, supra note 96, at 164 et seq.

rate and in causing a regrettable migration from the rural districts to urban centers.[99] It has been argued that the only way for parents to assure their offspring an adequate provision is to have one child who inherits the whole estate. And where land holdings become too small to yield a living, the owners migrate to the cities altogether.

On the birth-rate question, it has been observed[100] that despite alternative movements in both directions population has maintained a fairly constant level, that while it increased in some places it decreased in others, and that in the different centers of population the small rural property owners were more prolific. While there may be some grain of truth in the original criticism, this is very exaggerated because it is impossible to find a direct and exclusive relationship between the parcellation of property through enforced partition and the allegedly low birth-rate.[101] Even if there has been a decrease in the birth-rate at some periods in certain parts of the country, it is more likely due to selfish distaste of parental duties or financial inability to maintain and educate the children. These conditions are, of course, found in many countries with totally different succession laws and customs.

Nor is the proof any more convincing that the succession laws cause the rural exodus. This problem has existed from very early times and under all sorts of conditions; such displacements are the normal phenomena of economic evolution whose results are on the whole satisfactory.[102] Furthermore, the emigrants sell out their holdings so that their places are taken by others.[103] As a matter of fact, it is often argued that the principle of equal division has done much to slacken this migration.[104]

(d) *Proposed Reforms.* Unfavorable observations and criticism were accompanied by a number of proposed reforms. Some critics advocated a return to the older system of more general restrictions, others proclaimed the urgent need for complete testa-

99. Le Play and others: see in Coulon, op. cit. supra note 94, at 11 et seq., 35; Garrigou, op. cit. supra note 41, at 82, 117, 139 et seq.; 3 Colin et Capitant, op. cit. supra note 28, at 761, nº 931.

100. Garrigou, op. cit. supra note 41, at 121, 128, 130.

101. Boissonade, op. cit. supra note 96, at 650-653; Voirin, supra note 96, at 170; Garrigou, op. cit. supra note 41, at 122, 127, 134, 137; 5 Roguin, op. cit. supra note 94, at 680 et seq.; 3 Colin et Capitant, op. cit. supra note 28, at 762, nº 931.

102. Garrigou, op. cit. supra note 41, at 143, 146.

103. Charmont, supra note 96, at 161.

104. Garrigou, op. cit. supra note 41, at 152.

mentary freedom.[105] Of the numerous proposals[106] during the nineteenth century, very few were of a serious nature.

The one which attracted most attention was made by Le Play and was given wide circulation by his school of thought about 1865.[107] This movement followed a well developed basis of legal history and philosophy, and it brought into bold relief all the evil consequences allegedly caused by the existing system. Their panacea was the elimination of the *réserve* and the establishment of complete liberty of disposition. The ideal was the English freedom of willing whose results were all beneficial. This admiring attitude also extended to the English primogeniture as the best means of retaining large landed estates.

But it was all to no avail, and despite the number of supporters these attempts were futile.[108] An extensive Investigation *(Enquête)* throughout the country was made in 1866—there was no particular desire for a change to testamentary freedom, but instead there was an almost complete approval of the existing system of equal division.[109]

Another seriously supported proposal came from Henri Coulon in 1899.[110] For the proper development of France, he considered it absolutely necessary to give the people a greater measure of testamentary freedom. This would assure many desired improvements in the family as well as in commerce and industry. Coulon followed the Le Play school along their general lines, but he departed from them in admitting that it was just and necessary to provide for the maintenance of children and parents. This concession should not be avaliable to all relatives in the direct line but only to those who were either minors or actually in need. Minor children should be assured the mainte-

105. 3 Colin et Capitant, op. cit. supra note 28, at 759-761, nº 930; 6 Beudant, op. cit. supra note 13, at 180, nº 129.

106. Bonnal, op. cit. supra note 95, at 14-15; Garrigou, op. cit. supra note 41, at 55-56, 170-171; Voirin, op. cit. supra note 96, at 165; Coulon, op. cit. supra note 94; 3 Colin et Capitant, op. cit. supra note 28, at 759, nº 930.

107. See in Garrigou, op. cit. supra note 41, at 51 et seq.; Coulon, op. cit. supra note 94, at 12; Charmont, supra note 96, at 157; 3 Colin et Capitant, op. cit. supra note 28, at 760 et seq., nº 930 [Le Play: La Réforme Sociale en France (1864), l'Organisation de la Famille (1868), l'Organisation du Travail (1870), La Constitution Essentielle de l'Humanité (1881)].

108. Le Play's scheme was also severely criticized in its turn. Garrigou, op. cit. supra note 41, at 53, 83; 3 Josserand, op. cit. supra note 79, at 857. See also list of references cited in Voirin, op. cit. supra note 96, at 169.

109. Garrigou, op. cit. supra note 41, at 55-56. Cf. Bonnal, op. cit. supra note 95, at 229, 261-271.

110. Coulon, op. cit. supra note 94.

nance and education which their parents had planned for them; and it was only human that adult children or ascendants, in need, should be taken care of. In such cases the major element of appreciation must be left to the court.[111]

In 1904, the centenary of the Civil Code was the occasion of a great celebration, and also a proper time to ask whether there should be a revision of the Code. Views were expressed[112] in favor of general or partial revision, and against it, but nothing was ever done. In the first one hundred years of its existence the Civil Code had been subjected to an average of about one modification each year and many of these were of minor significance.[113] As a body of civil law, the Code has remained intact; aided by legislation and interpretation it has continued to meet the changing needs by the natural processes of evolution.[114]

The specific question of excessive parcellation was answered by an Investigation in 1909[115] which showed that many parts of the country avoided an increase in the number of small properties by the customary practices to prevent partition.

As recently as 1928, a recommendation was made before the Society of Legislative Studies[116] that the text of the law should be reformed to correspond to its spirit, and that children who renounce or are unworthy should not be counted in calculating the *réserve*. In such event, the cumulation should be in favor of the disposable portion. While the anomaly in the actual application[117] of the principle was generally conceded, even by the

111. Id. at 29, 42-43, 53, 68-69. It is doubtful whether Coulon could have been posted on the debates which were at that very time taking place in the legislature of New Zealand, and it is remarkable how close his unsuccessful project was to the solution later adopted by a number of common law countries. See Dainow, supra note 1.

112. Josserand, La Propriété Collective, Le Code Civil Livre du Centenaire (1904) 357; Larnaude, La Nécessité de Révision, id. at 901; Pilon, Réforme par voie de Révision Générale, id. at 933; Planiol, Inutilité d'une Révision Générale du Code Civil, id. at 955; Gaudemet, Codifications Récentes, et la Révision du Code Civil (translated in 11 Continental Legal History Series, pp. 286-307); id. at 965. Cf. Josserand, Evolutions et Actualités (1936) 26 et seq.

113. Since 1904, this average has been much higher as a result of the acceleration in commercial and industrial progress. 1 Aubry et Rau, op. cit. supra note 13, at 45 et seq., § 13; Lobingier, supra note 48, at 130.

114. Cf. Colin, supra note 14, at 325; Josserand, La Propriété Collective, Le Code Civil Livre du Centenaire, 357; Josserand, Evolutions et Actualités, 27-28.

115. Garrigou, op. cit. supra note 41, at 71-72.

116. 24 Bulletin de la Société d'Etudes Législatives (1928) 87, 94, 272, ques. 69.

117. See text supported by note 83.

courts, it seemed doubtful whether such a change would be judicious. Tampering independently with one detail of a complex system might destroy the harmony between the underlying principles. It is noteworthy that while many questions frequently recur in the discussions of the Society, this particular issue has never reappeared.

From these few indications, and from the fact that many other causes have also contributed to the parcellation of land,[118] which existed long before the Civil Code,[119] it is manifest that one cannot find an exclusive relationship between the succession laws of restricted disposition and any specific social or economic consequences of the kind examined.[120] In each instance, a favorable or unfavorable position can be incorrectly rationalized from factual observations; and neither one can be convincing. In the natural sciences, a single cause and its effect can be isolated, but this is not often possible for the relation of a legal problem to social and economic consequences.[121]

Apart from historical analysis and general development, a rational and useful conclusion to be drawn from this kind of an inquiry is that the only way to construct or to analyze such a scheme of succession laws is on the basis of fundamental principles. And it may be that this institution of forced heirship in French law[122] has withstood all attempts at reformation because it was arrived at as the compromise of the two basic doctrines which have not and cannot be changed: the right of ownership and the duty of maintenance.

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118. Garrigou, op. cit. supra note 41, at 97; Bonnal, op. cit. supra note 95, at 230 et seq.

119. Garrigou, op. cit. supra note 41, at 82, 89; Bonnal, op. cit. supra note 95, at 326.

120. Garrigou, op. cit. supra note 41, at 167; Voirin, supra note 96, at 170; 5 Roguin, op. cit. supra note 94, at 664 et seq., 675, 694. Cf. Vallier, op. cit. supra note 5, at 582-583.

121. Cf. Charmont, supra note 96, at 156.

122. Recent reports show that about four-fifths of the successions in France go by intestacy. Amos and Walton, op. cit. supra note 82, at 338; 6 Beudant, op. cit. supra note 13, at 187, nº 133. From this it must follow that either the people are too disgusted with the insignificance of the disposable portion to make use of it, or that not being especially interested in testamentary disposition they are well content with the existing laws and prefer to let the general rules of intestate succession apply to the entire estate. The latter conclusion would certainly seem to be the justifiable and correct one. The repeated failures of all attempts to reform the limitations on gratuitous disposition corroborate the conclusion that the French people are well satisfied with their institutions.